Supreme Court of the United States

October Term, 1923.

No. 110.

SOUTHERN POWER COMPANY,
Petitioner,

against

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO AND CITY OF HIGH POINT,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS

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History of the Case.

This is a proceeding in mandamus brought in accordance with the Statutes of the State of North Carolina to compel the Southern Power Company, petitioner herein, defendant below, to continue to supply the North Carolina Public Service Company, respondent herein, plaintiff below, with electric current and power for use and resale in the cities of Greensboro and High Point, North Carolina. The action was begun by the filing of a complaint in the Superior Court

of Guilford County, North Carolina, on September 2, 1920. The Southern Power Company appeared and petitioned for the removal of the case to the United States District Court for the Western District of North Carolina on the ground of diversity of citizenship. The State Court declined to grant this motion, and on appeal by the defendant to the Supreme Court of North Carolina that Court (180 N. C. 335) affirmed the ruling of the Court below, holding that under the allegations of the complaint "a writ of mandamus may properly issue" and that a proceeding in mandamus is not of a removable character. Thereupon the defendant filed its answer in the Superior Court of Guilford County and the case coming on to be heard in that Court, final judgment was rendered on December 14, 1920, granting the relief prayed for in the complaint, and directing the defendant to continue to furnish current. From this judgment the defendant appealed to the Supreme Court of North Carolina.

Meanwhile, on September 15, 1920, the defendant, in pursuance of its purpose to remove, filed a transcript of the record in the United States District Court for the Western District of North Carolina, and on the 23rd day of October, 1920, filed its answer therein. The motion by the plaintiffs to remand was denied on the ground that the case was one for injunction rather than mandamus, and the District Court, on motion of the defendant, enjoined further proceedings in the State Court. On June 16, 1921, the case came on to be heard in the District Court. The plaintiffs, content with the situation presented by the complaint and answer, offered to submit upon the pleadings. Witnesses, however, were introduced by the defendant and, after hearing, the District Court decreed (R. 317) that the Southern Power Company should not be required to furnish current to the plaintiff company for resale to the cities of Greensboro and High Point or to other customers, but that it must furnish current to the plaintiff for motive

power in operating its street railway system in the two cities in question; and further prosecution of the pending or of any other suits in the Superior Court of Guilford County or elsewhere was enjoined.

From so much of this decree as relieved the Southern Power Company from the requirement to furnish current to the North Carolina Public Service Company for resale the plaintiffs appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which Court on May 11, 1922, reversed the decree of the Court below in this regard (R. 331, 344; 282 Fed. 837). A rehearing having been denied, the defendant has brought the case to this Court by petition for a writ of certiorari.

Statement of Facts.

The essential facts of the case lie within a comparatively brief compass, and in the main are not in dispute.

I.

The petitioner, Southern Power Company, defendant below, is a corporation under the laws of the State of New Jersey. Among other powers expressed in its charter are (R. 251)

> "to develop, control, generally deal in and dispose of to such person or persons, corporation or corporations, and for such price or prices and on such terms and conditions as to the corporation may seem proper, electrical and other power for the generation, distribution and supply of electricity for light, heat and power and for any other uses and purposes to which the same are adapted."

and also (R. 252),

> "to * * * buy, sell, operate or lease pole lines * * * and to use the same either for the transmission

> of electric current for delivery to consumers on such lines, or *for transmission of current to independent venders thereof.*"

It voluntarily domesticated itself in the State of North Carolina, and thus brought itself within the purview of the statutes of that State which declare (Consolidated Stats. of N. C. Ch. 21, Art. 2) that

> "All water power, hydro-electric power and water companies now doing business in this State, * * * * whether organized under the general or private laws of this State or under the laws of any other state or country, * * * * are deemed to be public service companies and subject to the laws of this State regulating public service corporations."

In pursuance of its charter powers, it has constructed about 1,500 miles of transmission lines (exercising in doing so the right of eminent domain) and had a generating capacity at the time of suit of about 300,000 horse power. In addition to the current which it develops itself, it purchases current from other large producers with which it is connected, such as the Carolina Light & Power Company, the Georgia Railway & Light Company, the latter of which connects in turn with the Central Georgia Power Company and the Columbia Power Company (R. 114, 115; map R. 300). Together with its connecting companies it owns and controls all the hydro-electric power now generated and available in this entire region (R. 118, 119).

Although permitted by its charter to engage in the sale of electric current, either at retail or at wholesale, it deliberately chose to engage by preference in the wholesale business. Thus in offering its bonds for public subscription in 1915, it described its business as follows (R. 299):

> "The Company supplies power to more than 170 mills which operate approximately 3,274,000

spindles, and 71,000 looms. It also *sells at wholesale* electricity for commercial and municipal uses to the *local distributing companies.*"

while the defendant's Vice-President testified (R. 114),

"We do not retail current in the sense of supplying lighting customers in any incorporated town in North and South Carolina except Salisbury."

How general was its practice of wholesaling current to independent venders for resale to the ultimate consumer appears from the following list of towns in which it is so engaged under contract with the independent vender or distributor in each locality:

TABULATION BY TOWNS IN NORTH AND SOUTH CAROLINA OF VENDER-CUSTOMERS OF SOUTHERN POWER COMPANY

Town	*Independent Vender*	*Page of Record*
Leaksville (Spray), N. C.	Leaksville Light & Power Co.	112, 255
Reidsville, N. C.	Southern Public Utilities Co.	104, 113
Greensboro, N. C.	N. C. Public Service Co.	91, 161
Burlington, N. C.	Piedmont Ry. & Electric Co.	112, 275, 282
Hillsboro, N. C.	Hillsboro Light & Power Co.	112, 266, 272
High Point, N. C.	N. C. Public Service Co.	90, 148
Winston-Salem, N. C.	Southern Public Utilities Co.	113
Lexington, N. C.	Municipality	127
China Grove, N. C.	Southern Public Utilities Co.	113
Mooresville, N. C.	Municipality	114
Hickory, N. C.	Southern Public Utilities Co.	118
Newton, N. C.	Municipality	127, 181
Statesville, N. C.	"	118
Morganton, N. C.	"	118
Mt. Holly, N. C.	Southern Public Utilities Co.	113
Belmont, N. C.	" " " "	113
Shelby, N. C.	Municipality	118, 181
Lincolnton, N. C.	"	147, 181
Concord, N. C.	"	110, 114, 131
Charlotte, N. C.	Southern Public Utilities Co.	113
Albemarle, N. C.	Municipality	127
Norwood, N. C.	Norwood Light & Power Co.	112, 261, 273
Monroe, N. C.	Municipality	114
Lancaster, S. C.	Lancaster Light & Power Co.	113
Chester, S. C.	Southern Public Utilities Co.	113
Greer, S. C. [Green]	" " " "	113
Greenville, S. C.	" " " "	113

This table, culled from the testimony, is not claimed by the petitioner's witness Lee (R. 112, 113) to be exhaustive. In view of the situation as shown by the map (R. 300) it is clearly not so. In addition the Southern Power Company sells electricity at wholesale to at least 300 cotton mill companies (R. 116), many of whom in turn retail it for lighting purposes in their mill towns.

The Southern Public Utilities Company, a Maine corporation, mentioned as one of the "independent venders" in the foregoing list, is stated by the Circuit Court of Appeals in its opinion to be "nothing more than an off-shoot of the Southern Power Company, controlled by it, and with the same stockholders" (R. 335), while the petitioner says in its brief (p. 42):

> "The business so carried on by the Utilities Co. is as much the business of petitioner as if it were carried on by petitioner in its own name. The petitioner controls it and the petitioner or its stockholders receive the profits."

Both statements go beyond the evidence. The complaint avers (R. 7) and the answer admits (R. 33) that J. B. Duke—not the Southern Power Company—is the principal owner of the stock of the Southern Public Utilities Company, but the witness Lee (R. 104) testified concerning Mr. Duke:

> "I do not think he has [a] very large holding now but he has had considerable interest."

That stockholdings are not identical in the two companies appears from his testimony (R. 118) to the effect:

> "The stockholders of the Southern Public Utilities Company are *to a large extent* stockholders in the Southern Power Company."

Although the Southern Public Utilities Company is loosely spoken of throughout the Record as an "affiliate" or "subsidiary" of the Southern Power Company,

it was "organized as a separate company" (R. 121) and the Southern Power Company is not the owner of its stock. The relation in law between the two companies is that of corporate strangers.

The contracts between the Southern Power Company and the independent venders were in the main on standardized printed forms prepared for that purpose (R. 130) with such differences in rates, conditions of delivery and other conditions as the Southern Power Company was able to negotiate during the period when it thought itself free from any form of regulatory control. Its contract (or contracts) with the Southern Public Utilities Company running until 1944 is not introduced in evidence, and it is asserted that it has never been executed by the Southern Power Company (R. 104).

The contracts in evidence, however, suffice to show beyond dispute the character of the business in which the Southern Power Company is engaged. Thus its standard printed form for municipalities and other public utilities companies (R. 308; witness Lee, R. 130) recites (first clause) that the Power Company will sell and deliver current "for use by the consumer and sale to its customers in and around ————;" that with the Leaksville Light & Power Company (R. 257) "for lighting streets and public and private buildings and for furnishing electric lights or electricity for lighting, heating and motive power to the inhabitants of the town of Leaksville and the vicinity thereof, and for other municipal purposes"; the same language appears in the contracts with the Norwood Light & Power Company (R. 263) and the Hillsboro Power & Lighting Company (R. 268), while the Piedmont Ry. & Electric Co. buys its current (R. 278) "for the purpose of its being used for the operation of its own plant or for resale to others."

In the states both of North and of South Carolina, the Southern Power Company has vigorously resisted the right of the states to regulate its rates and charges; but in 1920, following litigation between these same par-

ties concerning service in the City of Salisbury, the Power Company experienced a change of heart and filed a petition with the Corporation Commission of the State of North Carolina for a revision of its rates (R. 108, 109). Said the witness Lee (R. 110) with reference to this petition:

> "Q. You asked that the rates in all your outstanding contracts, some of them with six and eight years to run, both with cotton mills and municipalities and other public service companies —that the rate be abrogated and the Commission fix a higher rate?
>
> A. I do not know that we asked for that, but I have been advised that there can onl be one just and equitable rate for this purpose. , asked the Commission to fix that rate."

In view of all this, it is late in the day for the petitioner to contend that it has not dedicated its property to the manufacture and supply of electric current to other utilities companies for purposes of resale by them.

II.

The respondent, North Carolina Public Service Company, plaintiff below, is a corporation under the laws of the State of North Carolina. It was incorporated in the year 1909 as the successor of the Greensboro Electric Company, the High Point Electric Power Company and the Salisbury & Spencer Railroad Company. Its business consists of the operation and management of the street car systems in the cities of Greensboro and High Point, and of the control and operation of the electric light and power systems in both cities under franchises granted to it for that purpose. Through this system it furnishes under contract with the cities (High Point, R. 192, 196, 200, 202; Greensboro, R. 243) current for the lighting of their streets, public buildings,

parks, etc., and also sells and distributes current for light and power to the inhabitants of the same. While it is authorized by its charter to build and operate water powers for the production of electric current for sale throughout the State, it has never done so but has confined its activities to the cities of Greensboro and High Point.

It is also engaged in a somewhat similar business in the city of Salisbury, which has been the subject of litigation between itself and the Southern Power Company in the North Carolina courts; but the situation at Salisbury is not involved in this suit.

The North Carolina Public Service Company owns no generating plants with the exception of one small steam plant, now obsolete, at Greensboro, and it does not connect nor can it connect with any of the distributing companies other than the Southern Power Company (R. 114, 300). Some years ago the plaintiff's predecessor in interest, the High Point Electric Power Company, owned and operated a small steam plant at High Point, but under the terms of its contract with the Southern Power Company hereinafter mentioned, it was stipulated that this steam plant should be dismantled, which was accordingly done (R. 90, 149). Since the making of the contracts hereinafter described, the North Carolina Public Service Company has relied and has been led to rely solely upon the electric current which the Southern Power Company is engaged in distributing to it and to other independent venders throughout the State.

III.

The respondents, City of High Point and City of Greensboro, are municipal corporations under the laws of North Carolina. As such they are empowered by statute (Cons. Stats. of N. C., Secs. 2832, *et seq.*) to establish and operate electric generating systems for the distribution of electric power and current to their

inhabitants as well as for their municipal use. Instead of so doing, however, they have deemed it expedient to grant franchises for the purpose in each city to the North Carolina Public Service Company, and to contract with it (R. 192, 196, 200, 202, 243) for the lighting of their streets and the service of current to the municipalities and their inhabitants. They are content with this arrangement and wish it to continue.

IV.

The Southern Power Company has no franchise enabling it to do business in the cities either of Greensboro or High Point. Its application to the City of Greensboro for such a franchise in April, 1920, was rejected by the decisive popular vote of 990 to 78 (R. 242). The statement in petitioner's brief (p. 30) that it "has for a long time been distributing current at retail" in each of said cities is a patent inadvertence.

The only customers of the Southern Power Company at the City of High Point are the North Carolina Public Service Company, and the Pickett Mills and Highland Mills, which lie without the city. The Milton Rhodes Company, whose application was refused by the Southern Power Company and accepted by the North Carolina Public Service Company (Petitioner's Brief, pp. 12, 30), is situated inside the corporate limits and therefore within the area which the Southern Power Company has no franchise rights to serve. Its situation was the same as that of the High Point Silk Mill, as to which the General Manager of the Southern Power Company wrote (R. 294):

> "His mill being located within the city limits of High Point, we did not feel at liberty to enter into any negotiations with him at all."

At Greensboro, the Southern Power Company serves only the North Carolina Public Service Company, and

the Proximity and Revolution mills, which lie without the corporate limits.

The terms of the contracts, shortly to be mentioned, made by the Southern Power Company with the predecessor companies of the North Carolina Public Service Company provide for the sale of its current not only inside the cities of Greensboro and High Point, but to "the inhabitants in the vicinity thereof." Accordingly, the North Carolina Public Service Company has with the consent of the petitioner, expressed in some instances (R. 126, 291, 293, 295), and implied under the terms of the contract in others, extended its lines to certain industries in the outskirts of Greensboro and High Point. There is no evidence that the Southern Power Company objected to any of these extensions, and specific proof of their consent to most of them. The Southern Power Company has no lines to any of the concerns so served, nor has it made any effort on its part to furnish them with current (R. 126, 140).

V.

In the year 1908 the Southern Power Company entered into contracts (R. 148, 161) with the Greensboro Electric Company and the High Point Electric Company, predecessors in interest of the North Carolina Public Service Company, to furnish current to be (R. 149, 162, fourth clause)

> "sold or used in lighting the streets of said city and the public and private buildings therein, and for furnishing electric light or electricity for lighting, heating and motive power to said city and its inhabitants and the inhabitants in the vicinity thereof."

In order to make the position of the Southern Power Company clear beyond dispute, these contracts further provided that (R. 150, 163)

> "It is expressly understood and agreed that said Power Company is merely a furnisher of electric current deliverable at the delivery point hereinbefore provided for, and that said Power Company shall not be in any way responsible for the transmission or control of said electric power or current beyond such point of its delivery to said consumer."

At the expiration of these contracts which ran for ten years, the North Carolina Public Service Company, which had succeeded to all rights thereunder, undertook to obtain a renewal of the same, but the Southern Power Company insisted upon a new rate, higher than that which it was charging for the same service to the Southern Public Utilities Company and other similarly situated independent venders (R. 111). The North Carolina Public Service Company protested, but finally agreed to sign a contract at the higher rate, provided it contained a stipulation to the effect that (R. 111)

> "It is understood that the scale of rates herein stipulated is made subject to any ruling of the Court or corporation commission affecting rates."

To this provision the Southern Power Company refused to consent, and broke off the negotiations with letters (R. 15, 16) refusing to furnish a regular supply on any terms and withdrawing all offers to contract for power. Confronted with this definite and final refusal, the North Carolina Public Service Company brought its proceeding in mandamus under the statutes of North Carolina in such case made and provided (Secs. 866-7, Cons. Stat. of No. Car.) to compel the performance by the Southern Power Company of the duties it had assumed.

VI.

While the respondent in its letters of refusal dated January 8, 1920 (R. 15, 16) refers by way of excuse to the existing demands upon its supply, it is significant that on April 26, 1920, when seeking a franchise from the City of Greensboro, it stated (R. 237) that it would furnish

> "your city and its citizens whatever electricity shall be needed for municipal and domestic consumption,"

while Vice-President Lee stated upon the witness stand that his Company was ready, able and willing to sell and deliver electricity to Greensboro and High Point to supply the demand, and that it had the current for that purpose (R. 125). It appears that the amount of current consumed by the plaintiff company at Greensboro and High Point was at the time of suit less than 2% of the total available for sale by the defendant company.

In this situation, the Southern Power Company attempted, first, arbitrarily to impose upon the North Carolina Public Service Company, which it had been serving, rates in excess of those it was charging to like independent venders under similar circumstances and conditions, and, finally, to deprive it of all service whatever by unqualifiedly refusing to continue furnishing it with the necessary current.

Said Vice-President Lee (R. 112):

> "Q. Your contention is that there is no governmental control or control of the courts whereby your right to contract with other public utilities reselling can be affected, and that is a matter between you and them?
>
> A. Certainly it is."

As stated in the opinion of the Circuit Court of Appeals, the Southern Power Company's claim was nothing less than that it (R. 336, 282 Fed. 843)

> "owes no public service 'of transmission of current to independent vendors thereof'; that as to such service it is not subject to rules and regulations of the State Corporation Commission; that it may furnish one or many of these independent vendors to cities and towns to the exclusion of others; that it may refuse to furnish current on any terms to cities and towns themselves to be resold to their inhabitants; that it has absolute freedom of contract to discriminate in price and terms between all independent vendors, including cities and towns; that it has the right to create its own subordinate 'independent vendor,' Southern Public Utilities Company, and refuse to deal with any other on equal terms or on any terms."

In denying this claim, the Circuit Court of Appeals announced the governing principle of law as follows (R. 337; 282 Fed. 844):

> "But when a corporation has definitely undertaken and entered upon a particular service authorized by a charter which confers the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority and it must serve all alike. In such public service it cannot pick and choose its customers."

ARGUMENT.

I.

The Southern Power Company has dedicated its property to the business of selling electricity at wholesale to independent venders, such as the plaintiff, for resale and distribution. It is therefore subject to the legal duty of serving its customers without discrimination and at reasonable rates.

1.

The evidence overwhelmingly supports the fact of dedication.

The claim of petitioner that dedication is a question of fact and of intent may be conceded, but a clearer case could not be made than that presented by the evidence here. In the first place, the corporation is shown by its charter to have been formed for this among other lines of business. Its character as a public service corporation is made clear by the statutes of North Carolina to which it voluntarily submitted itself, and its exercise of the right of eminent domain is a conclusive index of its character. It is under no compulsion to exercise all of its charter powers, but having chosen to exercise its power to engage in the sale of electricity to independent venders, it cannot be held to say that it is a private corporation in this particular, although a public service corporation in all others.

The extent of its business in this respect is not open to dispute. The incomplete statement given in the record names no less than twenty-three towns in North Carolina and four in South Carolina in which it is selling to independent venders for resale to the ultimate consumer. In ten of these towns the sale is to a municipal corporation, which acts in the matter, of course,

not in a governmental but in a quasi-private character. *City of Los Angeles, et al. vs. Los Angeles Gas & Electric Company,* 251 U. S. 32. In ten of these towns the sale is to the Southern Public Utilities Company which, as shown by the statement of facts, is a corporation separate and apart from the Southern Power Company, although upon its formation the Southern Power Company deliberately withdrew in its favor from the retail field (R. 121). In seven of these towns the sale is either to the North Carolina Public Service Company or to some other public service corporation identical in character. One may well inquire how many more such contracts are necessary to evidence the intention of the Southern Power Company to engage in this line of business.

In addition to all this, there is the fact, which cannot be explained away or minimized, that the Southern Power Company has itself made application to the Corporation Commission of North Carolina, the regulating body, to fix and establish rates and charges by it in wholesaling electricity to the cotton mills, municipalities and other public service companies. On what possible theory can the Southern Power Company at one and the same moment invoke on the grounds of a public service the regulatory power of the Corporation Commission and deny on the claim of a private business the power of the courts concerning one and the same class of activities?

2.

The resultant duty not to discriminate is mandatory.

The duty not to discriminate is expressly imposed by the law of North Carolina. As has been stated, hydro-electric companies are declared to be public service corporations, and as such are placed under the control of the Corporation Commission. (Cons. Stats.

N. C., Sec. 1035.) The Commission is given power by Section 1054 "to make reasonable and just rules and regulations to prevent discrimination in the transportation of freight or passengers or in furnishing electricity, electric light, current, power or gas." By undertaking to operate in the State of North Carolina, the Southern Power Company, of course, subjected itself to these mandatory provisions which, after all, are merely declaratory of a duty long recognized by the common law.

In a case between the instant parties in which the precise question here arising was involved, the Supreme Court of the State of North Carolina has already held that the Southern Power Company must be taken to have devoted its property to the public use in the matter of the sale of current to independent venders as well as to those whom it chooses to classify as ultimate consumers. *North Carolina Public Service Company vs. Southern Power Company*, 180 N. C. 335, 104 S. E. 872; *Salisbury & Spencer Ry. vs. Southern Power Co.*, 179 N. C. 18, 330, 101 S. E. 593, 102 S. E. 625. In the course of these several opinions the Supreme Court of North Carolina has said (102 S. E. 625, 626):

> "The defendant [Southern Power Company] had the right originally to confine its sales and contracts to those desiring electricity for direct personal consumption, and thereby retain control of the number of its customers, limiting them to that number it could adequately serve. But when defendant voluntarily entered the field of supplying current to a person or corporation which does not desire it for consumption but to sell and distribute it to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation desiring current from it for distribution purposes *prima facie* has precisely the same right to obtain it as another. A public service corpora-

tion cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons."

And again (102 S. E. 625, 626):

"The plaintiff is a retailer of electricity and engaged in supplying the citizens of Salisbury and Spencer with electricity to light their residences and for other private purposes. It cannot compete with the defendant, for the latter does not undertake to supply residences, and is in every sense a wholesaler of the electric current. The plaintiff supplies no territory supplied by defendant, but buys its current from the latter and distributes it among the inhabitants of a limited territory. While this plaintiff has power under its charter to manufacture, at instance of defendant, it ceased to do so ten years ago, and the defendant has supplied the current by contract ever since. It has for all these years elected to treat the plaintiff and other similar corporations as a part of the general consuming public and to furnish them with electricity as a means of supplying the citizens of the territory that the defendant occupies."

And again (101 S. E. 593, 599):

"The counsel for the defendant, upon the argument, stressed the contention that, both plaintiff and defendant being public service companies, and authorized by their respective charters to generate and sell to the public electric current, plaintiff could not evade this duty and require the defendant to furnish it current and power to resell. This argument is plausible, but we think unsound and untenable upon the admitted facts in this record. The defendant's charter expressly authorizes it to sell current and power to other public utility companies for the purpose of resale. This charter power is not mandatory. Still when the defendant elected to exercise this power, and ten years ago made a contract with plaintiff, Salis-

> bury & Spencer Railroad, to furnish current and power to be resold to the people of that city for the next succeeding ten years, and induced it to scrap its steam plant and to rely solely upon the defendant for its hydro-electric power and thereafter made similar contracts with the other plaintiff, the North Carolina Public Service Company, for ten years for current to be resold in Greensboro and High Point, and contracted with its own subsidiary, the Southern Public Utilities Company, to furnish it current and power up to 1944, to be resold, it dedicated its property to this particular class of public use and cannot discriminate in charge or service between the several members of this class."

It is not surprising that the conclusion of the Circuit Court of Appeals in the instant case entirely concurred with the views of the Supreme Court of North Carolina. Said the Circuit Court of Appeals (R. 337, 282 Fed. 837, 844):

> "In this instance the Southern Power Company has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the state. It cannot now be heard to say that it owes no public duty with respect to that service, and that it may pick and choose its customers, and arbitrarily discriminate among them."

The principle so relied upon has the uniform support of this and of other courts.

> *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345;
> *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650;

Western Union Telegraph Co. v. *Public Service Commission*, 230 N. Y. 95;

U. S. Telephone Co. v. *Central Union Telephone Co.*, 171 Fed. 130 (affirmed C. C. A. 202 Fed. 66);

Perceval v. *Public Service Commission* (N. Y.), 163 A. D. 705, 148 N. Y. S. 583;

Attica Water, Gas & Electric Co. v. *Alden-Batavia Natural Gas Co.*, 3 P. S. C., 2nd Dist. (N. Y.) 207;

Re East St. Louis Light & Power Co. (Ill.), P. U. R. Ann. 1919 E, 379;

Mill Creek Coal & Coke Co. v. *Public Service Com.*, 84 W. Va. 662; 100 S. E. 557;

Re Great Western Power Co. (Cal.), P. U. R. Ann. 1917 F, 569, 580;

Clarksburg Light & Heat Co. v. *Public Service Commission*, 84 W. Va. 638, 100 S. E. 551;

Western Union Telegraph Co. v. *Commercial Cable Co.*, 177 Cal. 577, 171 P. 317;

Delaware, etc., Co. v. *Postal Telegraph Co.*, 50 Fed. 677;

Bell Telephone Co. v. *Commonwealth*, 17 Phila. 405, 3 A. 825;

Chesapeake & Potomac Telephone Co. v. *B. & O. Telephone Co.*, 66 Md. 399, 7 A. 809;

Wood v. *Consumers' Gas Co.*, 157 Ind. 345, 61 N. E. 674.

The case of *Attica Water, &c., Co.* v. *Alden-Batavia Natural Gas Co., supra,* is interesting because of the similarity of its facts to the case at bar. The Alden-Batavia Natural Gas Company, a producing and distributing company, furnishing the village of Batavia, and having a small main running up to the corporate limits of Attica through which it furnished gas to the Attica Natural Gas Company under a ten year contract, refused to sell gas to the Attica Water, Gas & Electric

Light Company, a corporation distributing to consumers in the village of Attica. Said the Public Service Commission (p. 211):

> "Every consideration of public welfare sustains the holding that a natural gas company may properly confine its sales to those desiring its commodity for direct consumption and thereby retain control of the number of its customers, limiting the same to that number which it can serve adequately. But when it voluntarily enters the field of supplying gas to a person or corporation which does not desire it for consumption but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provision of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation desiring gas from it for distribution purposes *prima facie* has precisely the same right to obtain it as another. A public service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reasons."

So in *Perceval vs. Public Service Commission*, 148 N. Y. S. 583, the Court said (p. 586):

> "It is urged by the company, and apparently agreed by the Commission, that the company in any event is not obliged to furnish electricity for power and refrigerating purposes. * * * In our opinion, however, the company's duty to furnish service does not rest upon the statute alone, but upon the common law obligation as a public service corporation which requires it to serve impartially every member of the community. It may be that, if it did not undertake to furnish electricity for power purposes to anyone, it could not be coerced to do so. Upon that question we express no opinion. It does, however, profess and undertake to furnish electric current for power purposes, and this it does by virtue of its

franchise as a public service company. So professing and undertaking, it cannot arbitrarily pick and choose whom it will serve and whom it will not."

3.

The fact of dedication cannot be disguised nor the duty of equal service evaded by the device of special contracts.

The petitioner points to the fact that its sales to independent public service utilities, to municipal corporations and to the Southern Public Utilities Company have all been based upon express contracts, and that even when these contracts were based on standard printed forms they differed in the details which went to fill up the blanks left for that purpose. Prior to the reluctant hour when petitioner became convinced that a uniform rate was demanded by the law, it undertook to base these contracts upon varying rates. All this is now asserted to be evidence of an intent not to dedicate its property to public use. The contention, in other words, comes to this, that so long as the Southern Power Company covers each transaction by a special contract it may engage in this class of business upon any scale that it wishes without bringing itself within reach of the law.

Reduced to its simplest terms, the claim is that the petitioner, by the mere process of making discriminatory contracts, can free itself from the obligation which the law imposes not to discriminate. Although engaging in a course of conduct which admits of but one construction as to its intent, it may evade the consequences by a formal declaration that it does not intend to be bound by the consequences of its own acts.

The intent of the parties, of course, is to be gathered from their entire course of conduct.

Van Dyke v. *Geary*, 244 U. S. 39;
Terminal Taxicab Co. v. *Kutz*, 241 U. S. 252;
Lloyd v. *Haugh Transfer Co.*, 223 Pa. 148, 72 Atl. 516, 517;
Bare v. *Am. Forwarding Co.*, 242 Ill. 298, 89 N. E. 1021;
People ex rel. Perceval v. *Pub. Ser. Com.*, 148 N. Y. S. 583;
State v. *Butte City Water Co.*, 18 Mont. 199, 44 P. 996;
1 Wyman P. S. C. Sec. 206.

Or, as Wyman on Public Service Corporations states the law, Sec. 206:

> "When duties, not rights, are involved, such declarations that the business is private will not prevail if the other evidence is to the contrary."

No matter what contracts petitioner may have chosen to make, they cannot rise superior to the public right. As this court said in *Munn* v. *Illinois*, 94 U. S. 113, 126:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

Of a similar contention which was urged in *Clarksburg Light & Heat Co.* v. *Public Service Commission*, *supra*, the Court said (100 S. E. 551, 555):

> "The duty of the petitioner to supply the public with gas is its paramount duty. It makes

> no difference who that public is, or to what use the gas is to be appropriated. If the petitioner was allowed to conduct one-half of its business under public regulation, and to sell the other half of its product upon private contract, the result would be disastrous to the public, for the rates charged to private consumers would control those charged to the public consumers, or vice versa.
>
> * * * * * * *
>
> No one can serve two masters is as true to-day as it was 2,000 years ago, and it cannot be doubted that, if this petitioner is allowed to divide its allegiance in the manner desired, the service rendered by it to the class of its patrons, which it would soon despise, would be inefficient and ineffective to meet their reasonable demands, to the end that the needs of that other class of patrons which had secured its favor might be the more efficiently met. We are clearly of the opinion that, so long as the petitioner is engaged in supplying gas to the public in the manner in which it is at this time, it cannot supply a part of that public under private contract, and a part of it under public regulation."

Indeed, it is elementary that a public service corporation cannot by making contracts for future service or by mortgaging its property or pledging its income evade its public duties or prevent or postpone the exercise by the State of the power to compel their performance.

Chicago, Burlington & Quincy R. R. Co. v. *Iowa,* 94 U. S. 155, 162;

Louisville & Nashville R. R. Co. v. *Mottley,* 219 U. S. 467, 482;

Union Dry Goods Co. v. *Georgia Public Service Corporation,* 248 U. S. 372;

Producers' Transportation Company v. *Railroad Commission of the State of California,* 251 U. S. 228.

In support of its claim to this right of special contract, petitioner relies upon *The Express Company Cases,* 117 U. S. 1; the *Wharf Case, Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483; and the *Taxicab Case, Donovan* v. *Pennsylvania Co.,* 199 U. S. 279. In language to which nothing need be added, the Circuit Court of Appeals has disposed of its contention as follows (R. 337; 282 Fed. 844-5):

> "The Supreme Court cases relied on by the defendant are not controlling. In *The Express Company Cases,* 117 U. S. 1, the basis of the decision is that the railway companies never held themselves out as public service corporations in the sense of furnishing accommodation to other carriers who might wish to do an independent business on their lines. The court pointed out that such general service to all express companies applying for it is rendered impossible by the nature of the business. In *Louisville & Nashville R. R. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483, the court held that the public was not entitled to use as a public terminal for the delivery of freight a wharf built by the railway company over the water; putting the decision expressly on the ground that the wharf was built exclusively for the use of the railroad and had never been dedicated to a public use as a public terminal. The distinction is pointed out by this court in *Baker-Whiteley Coal Co.* v. *B. & O. R. R. Co.,* 188 Fed. 410. *Donovan* v. *Pennsylvania Co.,* 199 U. S. 279, decided that a railroad company has a right to contract with one transfer company to furnish cabs for the use of passengers and exclude other cabmen from its premises. But the decision was on the ground that the business of the railroad was to carry and provide for the convenience of passengers, that it had undertaken and owed no public duty to cabmen and therefore had the right to exclude them from its station, so long as such exclusion did not interfere with the reasonable accommodation of passengers."

II.

The claim that the North Carolina Public Service Company is a competitor of the Southern Power Company and as such not entitled to service is untrue in fact and without foundation in law.

1.

There is no existing competition between the two companies.

The claim that the North Carolina Public Service Company is a competitor of the Southern Power Company is wholly unsupported by the facts. Whether such competition does or does not exist is to be determined, not by comparing clause by clause the charters of the two corporations, but by looking to the business in which they are actually engaged. The Southern Power Company is a wholesaler of electric current, having control of all the hydro-electric current produced in this particular region. The North Carolina Public Service Company, on the other hand, is merely a local distributor of electric current, retailing it only in the cities of Greensboro and High Point and their vicinity. Within these cities the Southern Power Company does not, and for lack of franchise cannot, make sale of any current to the local consumers. Such sales as the North Carolina Public Service Company makes in the vicinity of these cities but outside the city limits it makes in express accord with the contracts between its predecessor corporations and the Southern Power Company, and with the consent of the Southern Power Company. There is no single purchaser named in the record for whose patronage the two companies are contending.

Competition, of course, is a matter of fact and not of hypothesis. As defined by this Court in *U. S.* v. *Union Pacific R. R.*, 226 U. S. 61, 87:

"To compete is to strive for something which another is actively seeking and wishes to gain."

The North Carolina Public Service Company is no more a competitor of the Southern Power Company than are the Leakesville Light & Power Company, the Piedmont Railway & Electric Company, the Hillsboro Electric Light Company, the Norwood Light & Power Company and the Lancaster Light & Power Company, all independent corporations and distributors whom the Southern Power Company is serving, and all corporations of the same general character as the North Carolina Public Service Company.

Indeed, it is no more a competitor than are the various municipal corporations to whom power is being supplied at wholesale. Each of these municipalities is empowered by its charter to build and operate its own electric light system, using for that purpose, of course, either steam or water power at its pleasure, and any one of them might, if it saw fit, engage tomorrow in producing and supplying electric current to its inhabitants in competition with any supply which the Southern Power Company might choose to furnish.

Admittedly, the Southern Public Utilities Company is not a competitor of the Southern Power Company, not only because of the stockholders common to the two companies, but because the Southern Public Utilities Company is engaged in the retail business which the Southern Power Company expressly abandoned to it. Yet questions of stock ownership aside, no distinction can be drawn between the relations that prevail in point of competition between the Southern Power Company and the Southern Public Utilities Company on the one hand, or the North Carolina Public Service Company on the other.

2.

Even if there were some existing competition between the two companies (which respondents deny) that alone would not justify discrimination in rates and service.

So long as the Southern Power Company has engaged, as it has, in the business of selling electric current at wholesale for distribution at retail, it cannot pick and choose among its customers. It cannot deny service to the North Carolina Public Service Company on the theory that it is a competitor where it is continuing its service to others similarly situated. This doctrine has been the subject of repeated adjudication.

Western Union Telegraph Company v. *Public Service Commission*, 230 N. Y. 95;
Postal Telegraph Cable Company v. *Associated Press*, 228 N. Y. 370;
U. S. Telephone Company v. *Central Union Telephone Company*, 171 Fed. 130; affirmed C. C. A. 202 Fed. 66;
State v. *Cadwallader*, 172 Ind. 619, 87 N. E. 644;
Central Elevator Company v. *Moloney*, 174 Ill. 203, 51 N. E. 254;
Postal Telegraph Cable Company v. *Cumberland T. & T. Co.*, 177 Fed. 726.

In *Western Union Telegraph Company* v. *Public Service Commission, supra*, it was insisted that the Western Union Telegraph Company was under no duty to permit its rival, the Postal Telegraph Company, to use its wires on credit in forwarding the messages of the Postal Telegraph Company in the same way as did other customers of the Western Union. This conten-

tion the New York Court of Appeals disposed of in a unanimous opinion, as follows (230 N. Y. 95, 100):

> "The answer made by the respondent is that the Postal Company is not its customer, but its competitor, and thus stands in a different position, and further that by accepting their telegrams they are helping the Postal to deceive the public. This is aside from the real issue. The main consideration is where lies the benefit to the public and not that of assisting either of these corporations in their rivalries. * * * The public is not much concerned with the rivalries of these two companies. The question narrows down to this: Is one less a customer of the Western Union Company because it is a competitor and is not a competitor presenting himself as a customer a part of the general public and entitled to the same privileges and rights as any other customer because incidentally he happens to be a competitor? I can see no difference in principle. * * * Between these two corporations each represents the public when applying to the other for service, and no discrimination can be made by either against the other, but each must render to the other the same services it renders to the rest of the community under the same conditions."

Said the Court in *Postal Telegraph Cable Company* v. *Associated Press, supra,* in discussing the same question (228 N. Y. 370, 383):

> "A public service corporation is not at liberty to grant extraordinary facilities to one man, and arbitrarily refuse them to another. It need not depart from the beaten track at all. If it does, it must not govern the deviation by prejudice or favor. What it grants to one, it must, in like conditions, when detriment would follow preference, grant impartially to all, within the limits of capacity."

In *U. S. Telephone Co.* v. *Central Union Telephone Co., supra,* Judge Taylor, in discussing the relation of the two telephone companies to each other, said (171 Fed. 130, 144):

> "But we have a very different situation where, as in this case, a local company, assuming that it cannot be compelled to make or permit a connection with a long distance company, does in fact permit it. If the local company extends the use of its lines to long distance service, does it make the long distance service any the less of a public character than its local service? Assuming that it had a right to remain independent of and isolated from long distance business, does it not give up that right of local independence and isolation when it takes on long distance business? And if, in respect to long distance business, it has granted the right of connection to one long distance company, can it, either under the common law or the statutes of Ohio deny to one long distance company the right and privilege which it has granted to another? It seems to me that to put this question is to answer it. To this effect is *Ohio ex rel.* v. *Telephone Company,* 36 Ohio State 296, 38 Am. Rep. 583."

Judge Taylor then quotes with approval the following from the syllabus of *State* v. *Cadwallader, supra*:

> "Where an operator of a telephone system furnished connected immediate service to separate exchanges and their patrons, but denied such service to another exchange and its patrons of the same class, the operator discriminated against the latter in violation of the common law and of the statute of Indiana, requiring telephone companies to supply applicants impartially."

In commenting upon this case, Judge Taylor continues (171 Fed. 130, 146):

> "I find myself profoundly impressed with the soundness of the conclusion just quoted, and, in-

> deed, I can conceive of no plausible argument against it. The telephone company is a public servant and is a common carrier of news, as the Indiana Supreme Court puts it. It cannot enter into a contract which tends to create a monopoly; and it cannot deny to one person the rights and privileges which it grants to other persons similarly situated."

This same question is fully discussed in the well-considered case of *Postal Cable Telegraph Company* v. *Cumberland T. & T. Company, supra.* The Court there said (177 Fed. 726, 732):

> "The portion of the sovereign power with which telephone companies are as common carriers endowed is likewise given them for the purpose of serving not merely part of the public, but all of the public; and all persons composing the public, even though they be, in a sense, competitors, are entitled to use their privileges upon equal terms, and 'have equal rights both in respect to service and charge.'"

The repeated claim of the Southern Power Company that it may prefer among its customers at least its ally, the Southern Public Utilities Company, may be answered in the language of Mr. Wyman in his book on Public Service Corporations, Section 710:

> "This at least may be regarded as conceded —that a public service company, if engaged in private business for itself, dependent upon the service it conducts, ought not to prefer itself to its competitors in business among the general public who have already made application for service. * * * While those who conduct private enterprises may use many schemes, those who confess a public employment must not adopt any business policies which are in any way truly inconsistent with their public duties. And it may very probably turn out that it will be found necessary, for the maintenance of the highest type of public service, to forbid those who undertake

> such callings from engaging at all in business of their own where their interests might come in conflict with the interests of those whom they are serving."

3.

There is no inconvenience, present or prospective, in the continued service of current to the North Carolina Public Service Company.

No little effort has been expended to defend the action of the petitioner on the ground of inconvenience. In order to emphasize this contention, petitioner has made and filed in this Court its so-called motion to maintain the *status quo* of the parties in which it has been at some pains to show that the power consumed by the North Carolina Public Service Company has materially increased during the years 1920, 1921 and 1922.

Of this and all similar contentions it may be said first of all, that at the time the business was begun at High Point and Greensboro, all parties contemplated that it would be a growing one. Thus the High Point Electric Power Company wrote to the Southern Power Company in advance of making the contract (R. 159):

> "The business is growing and in the next twelve months we will add many more customers. We hope to get the City Water Works four miles from town. * * * We will go after everything here and land everything possible on our line."

In June, 1909, the Southern Power Company wrote to the Manager of the Greensboro Electric Company (R. 290):

> "Your Greensboro situation is going to grow very fast."

In January, 1914, the Manager of the Southern Power Company acknowledged the receipt of a list of prospective electric power customers in and about Greensboro (R. 291), and in 1917 the Southern Power Company writes (R. 292),

> "We would like to take care of the future as well as the present."

thus verifying the statement of the witness Lee (R. 124) that the contract with the North Carolina Public Service Company "contemplated that this business should grow in ten years."

But if the business of the North Carolina Public Service Company has grown, the Southern Power Company has been no less fortunate. The answer filed in response to the aforesaid motion discloses the fact that since the original decree was entered in this case, the generating horse-power of the Southern Power Company has been increased from 300,000 to 500,000, and its electric capacity measured in kilowatt hours from the 741,984,705 K. W. H. shown by the record (R. 93) to 2,808,000,000 K. W. H.

At the time of the decree it appeared, as we have stated above, that the service at Greensboro and High Point called for something less than 2% of the total power available on the part of the Southern Power Company, whereas at present, the date of the motion and of its submission, the demand is for less than 1% of the petitioner's total capacity output (Reply to Motion, p. 13). Not only so, but it appears that notwithstanding its pretended alarm at the growth of the business in Greensboro and High Point, petitioner during this period has been engaged in taking on new customers, more specifically the Caldwell Power Company, which operates at the towns of Lenoir and Morgantown. (See Exhibit A with Respondents' reply to the motion.)

It also appears, by way of additional reassurance, that in the month of July, 1921, the Southern Power Company was granted by the North Carolina Corporation Commission an extra charge of 10% for its current sold to other public utility companies (Reply, p. 10); and that no later than the 13th day of October, 1923, it filed its petition before the Commission asking a further increase.

The fact is, and it is a matter of general knowledge, that the entire region covered by petitioner's lines in North Carolina and South Carolina is enjoying a period of great prosperity and development. That the petitioner expects this development to continue is manifest from the exertions which it has made since the decree in this case to extend and enlarge its facilities for service. It ill becomes the petitioner, however, to make of this growth and development an excuse for cutting off existing customers in order to secure new ones, or for discriminating among its patrons in order by eliminating them entirely from the field to draw a greater share of profit to its own stockholders. It will be time enough when petitioner's capacity is truly overtaxed to consider, in the proper forum, the equities prevailing among its patrons.

There is no escape, we submit, from the conclusion that the petitioner's refusal to continue furnishing electric energy to the respondents at Greensboro and High Point is not justified by the facts of record and is unwarranted in law. Its course of dealing discloses that its refusal does not spring from economic reasons, since the respondent Public Service Company is ready and willing to pay the same rate charged other like consumers. Its action can be ascribed only to a desire to acquire for itself a complete monopoly of the wholesale distribution and sale of hydro-electric current in this part of North and South Carolina, and by a system of discriminatory treatment to obtain a similar monopoly in the retail field for the Southern Public Utilities Company in which its stockholders are interested.

CONCLUSION.

Said the Supreme Court of North Carolina in *Salisbury & Spencer Railway Company and North Carolina Public Service Company* v. *Southern Power Company*, 179 N. C. 18, 101 S. E. 593, 599:

> "It is of the highest importance that these claims of the defendant Southern Power Company to discriminate in the rates charged by it to purchasers under like conditions should be clearly denied by the courts."

The proceeding in mandamus which the respondents have adopted furnishes the remedy provided by the Statutes of North Carolina and sanctioned as appropriate by the decisions of its highest court.

It is respectfully submitted that on the law and the facts the decree of the Circuit Court of Appeals should be affirmed.

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